

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM STEWART,

Defendant-Appellant.

UNPUBLISHED

May 28, 2002

No. 230899

Wayne Circuit Court

LC No. 99-012574

Before: Whitbeck, C.J., and O'Connell and Meter, JJ.

PER CURIAM.

Following a jury trial,¹ defendant was convicted of first-degree home invasion, MCL 750.110a(2), unarmed robbery, MCL 750.530, three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c) (sexual penetration occurring under circumstances involving the commission of other felony), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(c) (sexual contact occurring under circumstances involving the commission of other felony). The trial court sentenced defendant to a term of 7 to 20 years' imprisonment for the first-degree home invasion conviction, to be served consecutively to concurrent terms of 8 to 15 years' imprisonment for the unarmed robbery conviction, 10 to 25 years' imprisonment for each CSC I conviction and 5 to 15 years' imprisonment for each CSC II conviction. We affirm.

On appeal, defendant first argues that the trial court committed error warranting reversal when it instructed the jurors that if they found the prosecutor had proven the elements of the charged offenses beyond a reasonable doubt, they must convict defendant. Specifically, during its closing instruction, the trial court stated:

Every crime is made up of parts [called] elements. The prosecutor must prove each element of the crime beyond a reasonable doubt. Neither defendant is required to prove his innocence or do anything. *If you find the prosecutor has not proven every element beyond a reasonable doubt, then you must find each*

¹ Defendant was tried during a joint jury trial with codefendant Antoine Smith. Smith's appeal is also before this panel in Docket No. 230898.

defendant not guilty. If you find the prosecutor has proven each element beyond a reasonable doubt, then you must find each defendant guilty. [Emphasis supplied.]

We review a trial court's instructions to the jury as a whole to determine if they fairly presented the issues to be tried and sufficiently protected the defendant's rights. *People v McCrady*, 244 Mich App 27, 30; 624 NW2d 761 (2000); *People v Ullah*, 216 Mich App 669, 677; 550 NW2d 568 (1996). Defendant failed to preserve this issue of instructional error for our review by objecting in the lower court. Therefore, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After a thorough review of the challenged instructions, we are satisfied that the trial court's instructions fairly presented the issues to be tried to the extent that plain error affecting defendant's substantial rights did not occur. *McCrady*, *supra* at 30.

In a criminal jury trial, the Sixth and Fourteenth Amendments combine to require that the elements of the charged offense be proven beyond a reasonable doubt. *People v Bearss*, 463 Mich 623, 629; 625 NW2d 10 (2001). Thus, it is error for the trial court to direct a verdict of guilty in whole or in part no matter how overwhelming the evidence of guilt. *People v Duncan*, 462 Mich 47, 53; 610 NW2d 551 (2000); *People v Goss (After Remand)*, 446 Mich 587, 596-597, ns 12, 13; 521 NW2d 312 (1994); *People v Reed*, 393 Mich 342, 350-351; 224 NW2d 867 (1975).

In the present case, the trial court properly instructed the jury regarding the presumption of innocence and the burden of proof. Further, the challenged portion of the trial court's instructions did not direct a guilty verdict in whole or in part or otherwise invade the factfinding province of the jury. Rather, the trial court instructed the jurors that if they found that the prosecutor had proven every element of the offenses beyond a reasonable doubt, then a verdict of guilty was appropriate. Notably, although defendant omits any mention of this in his brief on appeal, a review of the instructions in context reveals that the court also instructed the jurors that if the prosecutor *did not* meet its burden of proof with respect to every element of the charged offenses, the defendants must be acquitted. On this record, there is absolutely no indication that the trial court impermissibly "attempt[ed] to override or interfere with the jurors' independent judgment in a manner contrary to the interests of . . . [defendant]." *United States v Martin Linen Supply Co*, 430 US 564, 573; 97 S Ct 1349; 51 L Ed 2d 642 (1977).

In *People v Reichert*, 433 Mich 359, 361; 445 NW2d 793 (1989), the trial court instructed the jurors during jury selection in a similar fashion to the trial court in the instant case. Specifically, in explaining the burden of proof to a particular juror the trial court stated:

[I]f after you have heard all the evidence in this case and I instruct you that the burden of proof is on the Prosecutor to establish each and every element of the crime -- let's assume for purposes of illustration that there are four elements of the crime that the prosecutor has to prove to you beyond a reasonable doubt, and after hearing all of the evidence, you are convinced beyond a reasonable doubt that the prosecutor has established each and every one of those four elements. *Do you understand that the verdict in that instance, if you were convinced beyond a reasonable doubt, would be guilty?* [*Id.* at 361 (emphasis in original).]

On appeal, our Supreme Court found the trial court's instructions during jury selection proper and opined:

We are persuaded that the remarks challenged by the instant defendant did not constitute error requiring reversal. The trial court was merely informing the jurors of their obligation to apply the law in accordance with its instructions. The court explained what the jurors "would" do if they were true to their oaths and performed their legal duty. There has been no suggestion that the jury was not otherwise properly instructed. [*Id.* at 363-364.]

Similarly, in *United States v Pierre*, 298 US App DC 5, 6-7 (1992), the trial court instructed the jury in a similar manner as the trial court in the present appeal.

Ladies and gentlemen, every defendant in a criminal case is presumed to be innocent. This presumption of innocence remains with the defendant throughout the trial, unless and until he is proven guilty beyond a reasonable doubt. The burden is upon the government to prove the defendant guilty beyond a reasonable doubt. This burden of proof never shifts throughout the trial. The law does not require a defendant to prove his innocence, or to produce any evidence. If you find that the government has proven beyond a reasonable doubt every element of the offense with which the defendant is charged, and which I will define for you, it is your duty to find him guilty. On the other hand, if you find the government has failed to prove any element of the offense beyond a reasonable doubt, then you must find him not guilty.

The *Pierre* court found that the trial court's instruction did not inhibit the jury's right to acquit the defendant and therefore did not direct a guilty verdict. *Id.* at 7. Rather, the court held that the instruction merely clarified the responsibility of the jury on making its factual determination and accurately stated the duty of the jury. *Id.* Consequently, on the basis of the foregoing, we are not persuaded that the trial court's instruction to the jury amounted to plain error.

Next, defendant argues that the trial court committed error when instructing the jury on the law of aiding and abetting. According to defendant, the instruction would have permitted the jury to find defendant criminally responsible for assisting himself, something not possible. Moreover, defendant claims the trial court's instruction on the requisite intent was incomplete because it did require that to establish culpability as an aider and abettor the accused must possess the same intent required for liability as a principal. Because defendant did not raise an objection in the lower court our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763. After carefully reviewing the instructions as a whole we conclude that defendant's arguments are meritless, and are satisfied that the instructions properly presented the issues tried and sufficiently protected defendant's rights. *McCrary, supra* at 30.

Defendant correctly notes that to be found guilty as an aider and abettor, someone must have committed the crime as a principal. *People v Wilson*, 196 Mich App 604, 614; 493 NW2d 471 (1992). However, the law does not distinguish between a principal and an accomplice when one is charged, tried, convicted and punished for a criminal offense, MCL 767.39; *People v*

Coomer, 245 Mich App 206, 223; 627 NW2d 612 (2001), and the prosecutor may properly proceed on alternative theories that a defendant is guilty either as a principal or as an aider and abettor. See e.g., *People v Gadomski*, 232 Mich App 24, 30-31; 592 NW2d 75 (1998). To establish criminal liability under an aiding and abetting theory there must be evidence of a guilty principal. *People v Vaughn*, 186 Mich App 376, 381-382; 465 NW2d 365 (1990). Further, as the prosecutor acknowledges in her brief on appeal, where the prosecutor presents sufficient evidence of the defendant's guilt under either a principal or aiding and abetting theory, the defendant's right to a unanimous verdict is not violated by the return of a general verdict of guilty without the jury's specification on which alternative theory it relied. *People v Smielewski*, 235 Mich App 196, 201-202; 596 NW2d 636 (1999).

When reviewed in their proper context, the trial court's instructions made clear that alternate theories were being advanced and that, to be guilty as an aider and abettor, the jury must find (1) that defendant assisted someone else in committing the offense, and (2) that defendant possessed the requisite intent or was aware that the principal possessed such intent. After reviewing the instructions as whole, we are of the view that they properly stated the applicable law with regard to accomplice liability. See *Carines*, *supra* at 757-758.

Next, defendant argues that he was denied a fair trial when the trial court permitted the prosecutor to admit into evidence codefendant Antoine Smith's statement to the police. In his brief on appeal, defendant challenges the admission of the statement into evidence, characterizing it as "rank hearsay." However, our careful review of the trial transcript reflects that when the parties were discussing the admission of this evidence, defendant's trial attorney told the trial court that once a challenged portion of the statement was excised, he did not object to the redacted statement being admitted into evidence. Once the statement was redacted, the trial court inquired of defendant's attorney whether he had any objection to the admission of the statement. In response, defendant's attorney clearly articulated that he had "[n]o objection." Under the circumstances, because defendant's attorney expressed his satisfaction with the admission of the statement after the challenged portion was excised, we are of the opinion that any error pertaining to the admission of this evidence has been waived. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).²

Next, defendant contends that remand for clarification of the sentences imposed by the trial court is necessary. We disagree.

At sentencing, the trial court first imposed a sentence of 7 to 20 years' imprisonment for the first-degree home invasion conviction and noted on the record that the sentence "will be served consecutive[ly] to the other sentences." The trial court also imposed concurrent sentences of 10 to 25 years' imprisonment for each CSC I conviction, 5 to 15 years' imprisonment for each CSC II conviction, and 8 to 15 years' imprisonment for the unarmed robbery conviction. In

² Likewise, defendant has not met the heavy burden of proving that counsel's action in not objecting to the admission of this evidence was not the product of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

response to defendant's inquiries at the sentencing hearing, the trial court indicated that the sentences for the CSC I, CSC II and unarmed robbery convictions were to run concurrently.

It is well-settled that a court speaks through its written orders and judgments. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997); *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989). In this case the judgment of sentence, consistent with the trial court's articulation on the record at the sentencing hearing, ordered that defendant's sentence for first-degree home invasion be served consecutively to the concurrent sentences for the CSC I, CSC II, and unarmed robbery convictions.³ Therefore, defendant's contention that remand is necessary for clarification is without merit.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

³ Defendant has not raised issues concerning possible double sentencing. Therefore, we do not address this issue.